BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDWARD H. ROBERTS Claimant	)	
VS.	)	
MIDWEST MINERALS, INC. Respondent	)	Docket No. 1,028,985
AND	)	
BUILDERS ASSOC. SELF INSURERS FUND OF KANSAS Insurance Carrier	)	

ORDER

Claimant requested review of the October 4, 2007 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on December 11, 2007.

APPEARANCES

Richard D. Loffswold, Jr., of Girard, Kansas, appeared for the claimant. Wade A. Dorothy, of Lenexa, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that the dispute surrounding the mileage and per diem associated with claimant's medical care have been resolved and are no longer an issue to be dealt with in this appeal.

ISSUES

The sole issue to consider in this appeal is whether K.S.A. 44-501a(f)(4) limits claimant's recovery to $50,000. Claimant maintains that because he had an *amputation* of his right arm rather than just a partial loss of use, he cannot have a functional

impairment to that appendage. Thus, he is entitled to the full value of his arm, 225 weeks, with no monetary limitation. Respondent contends this case is governed by the Board's earlier decision in *Biggs*[1] and that the ALJ's Award should be affirmed, subject to the parties' agreement involving the medical mileage and per diem payments.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a traumatic amputation of his right arm, 3 inches below his shoulder and returned to work in his former position as a plant superintendent supervising the quarry operation for respondent's company. There is no dispute that claimant has suffered a 100 percent loss of his right arm at the level of the shoulder. The dispute stems from the statutory interpretation and interrelationship of K.S.A. 44-510d and K.S.A. 44-510f(a)(4).

The Board has previously addressed a similar issue in *Biggs* where the claimant suffered a 78 percent permanent partial impairment to his left upper extremity including his shoulder. Biggs, however, did not suffer an amputation. The parties in that case stipulated that should the limitations of K.S.A. 44-510f(a)(4)(Furse 1993) not apply, claimant would be entitled to a disability award that exceeded the $50,000 cap. Biggs contended that the legislature intended the $50,000 to be applied to general body injuries, not scheduled injuries. After analyzing the statutory language, the Board concluded as follows:

> The Appeals Board finds the language of K.S.A. 44-510f(a)(4))(Furse 1993) to be clear and unambiguous. Accordingly, the Board need not look to legislative intent. The $50,000 limitation applies to permanent partial disability awards where functional impairment only is awarded. The express language is not limited to general body disability.[2]

Thus, Biggs' award of disability compensation was capped at $50,000, including the temporary total disability payments.

Claimant offers a 2 pronged argument in this claim. First, he argues that K.S.A. 44-510d does not apply to the complete amputation of an upper extremity. "Quite simply, the requested award for Mr. Roberts is not for functional impairment to his right arm, but is for the total loss of his right arm. Therefore, as a matter of statutory construction, K.S.A. 44-

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[1] *Biggs v. Davis, Unrein, Hummer, McCallister, Biggs & Head, L.L.P.*, Docket No. 241,091, 2002 WL 433107 (Kan. WCAB Feb. 13, 2002).

[2] *Id.* at 3.

510f[(a)](4) does not apply to a scheduled injury set forth in K.S.A. 44-510d when there is a total loss of the arm."[3] Stated another way, claimant can have no impairment because he lost his arm as opposed to suffering an injury to his arm.

Claimant's argument is unpersuasive because it fails to take into account the entirety of the statute he references. K.S.A. 44-510d provides in pertinent part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and K.S.A. 44-510i and amendments thereto...If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
>
> > (13) *For the loss of an arm*, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and *for the loss of* an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.
> >
> > (18) . . . Amputation at or above the elbow shall be considered loss of the arm . . .

Obviously, the statute contemplates that the *loss* or amputation of an arm and an impairment to an arm are both covered by the statute and are treated alike.

Claimant also argues that *Biggs* is distinguishable because claimant in this case suffered an amputation of his arm, while the claimant in *Biggs* only lost a portion of his arm. The ALJ rejected this argument and a majority of the Board agrees. *Biggs* governs this situation and the fact that claimant's injury involved an amputation does not alter the majority's view.

K.S.A. 44-510f(Furse 1993) states in part:

> (a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:
> . . .
>
> (4) for permanent partial disability, where functional impairment only is awarded, $50,000 for an injury or aggravation thereof.

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[3] Claimant's Brief at 5 (filed Oct. 31, 2007).

There is nothing within this language that says that this cap is applicable only to general disabilities or injuries to the body as a whole or that it is not applicable to injuries involving amputations. Had the legislature intended the cap to only apply to injuries that result in general body disabilities then it could easily have said so in the statute.

Accordingly, the ALJ's Award is modified to incorporate the parties' agreement that the cost of the 29 medical visits and the attendant medical mileage is to be paid by respondent but is otherwise affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated October 4, 2007, is affirmed in part and modified in part. Claimant's Award is subject to the $50,000 cap and he is further entitled to the medical mileage and per diem for 29 medical visits. All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of January, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

We disagree with the majority as we believe the $50,000 cap set forth in K.S.A. 44-510f (a)(4) (Furse 1993) does not apply to any awards for scheduled injuries, but in particular does not apply to an award of compensation for loss of a scheduled member by amputation.

K.S.A. 44-510f(a)(4) states as follows:

> (a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:
> . . .
> (4) for permanent partial disability, **where functional impairment only is awarded**, $50,000 for an injury or aggravation thereof. (Emphasis added)

There is little question that the purpose of the cap was to prevent large permanent partial general disability awards going to high-income wage earners who sustained nonscheduled injuries resulting in relatively small functional impairment ratings and who were able to return to their pre-injury jobs.

Under former law, awards for nonscheduled injuries that were based on relatively small functional impairment ratings could produce maximum, or substantial, awards due to the manner in which the permanent disability benefits were computed. When the legislature was debating the $50,000 cap, an injured worker was entitled to receive a maximum of 415 weeks of permanent partial general disability benefits at a weekly rate that was determined by multiplying the worker's average weekly wage by the disability rating (the work disability or the functional impairment rating, whichever was higher). And the higher the worker's average weekly wage, the higher the weekly benefit, subject, of course, to the limit on the maximum weekly benefit payable. Therefore, in cases in which permanent disability benefits were based upon the worker's functional impairment rating, a small functional impairment rating coupled with a high average weekly wage could result in a maximum award of benefits of $100,000. That is the result that the legislature intended to change with the $50,000 cap.

We do not believe the legislature intended to cap the benefits payable for scheduled injuries as they were already limited based upon the severity of the impairment. And the number of weeks compensation is payable is further limited for scheduled injuries. But that is the only limitation the legislature placed on payment of compensation for scheduled member injuries. Permanent partial disability benefits payable for scheduled injuries were, and still are, computed by multiplying the maximum weeks provided by the schedule by the percentage of functional impairment. Accordingly, when the legislature was debating the cap, a small functional impairment rating produced a relatively small number of weeks of permanent disability benefits payable. Coupled with the limit on the maximum weekly benefit payable, relatively low functional impairment ratings did not, and still do not, produce large awards in scheduled injury claims.

The legislative history regarding K.S.A. 44-510f(a)(4) (Furse 1993) only contains references to general body injury cases. In the committee discussions, there was no mention of capping scheduled disability cases. Such history clearly reflects the legislative intent was solely directed at general body injury cases and should not be ignored.

The majority concludes that, regardless of the legislative history, the statutory language of K.S.A. 44-510f(a)(4) (Furse 1993) is plain, unambiguous and applicable to scheduled injury cases. The determination of the extent of permanent partial disability for a scheduled disability, other than an amputation, is based upon the percentage of functional impairment. Conversely, the determination of the extent of permanent partial disability for a general body injury is based upon the greater of either the percentage of work disability or the percentage of functional impairment. The limiting phrase adopted in K.S.A. 44-510f(a)(4) (Furse 1993) "where functional impairment *only* is awarded" (italics added) makes sense when applied to a general body injury where the injured worker may receive compensation based upon the greater of either the work disability or the functional impairment. However, such language is unnecessary, redundant and ambiguous when applied to a scheduled injury as the functional impairment is all that can be awarded in cases other than amputations. Accordingly, the language adopted further reflects legislative intent to limit the cap to general body injury cases.

In short, the cap was intended to prevent large awards of permanent partial general disability benefits generated by relatively small functional impairment ratings. For that reason, the cap was not intended to apply to scheduled injury awards.

Setting aside for the moment the dissenting members' view that K.S.A. 44-510f(a)(4) (Furse 1993) was not intended to apply to injuries involving scheduled injuries, the express language of the statute is specifically inapplicable to amputations. The statutory cap only applies to those cases "where functional impairment only is awarded." In the case of a scheduled injury a functional impairment is only awarded where there is a loss of use of the scheduled member. Here there is no functional impairment. Rather, there is solely an amputation, resulting in loss of an arm. In this case there has been a loss of the scheduled member. Again, there is no functional impairment as there is a loss of the member by amputation resulting in the loss of the arm.

And loss of a scheduled member by amputation is not compensated based upon a percentage of functional impairment, instead, it is simply based upon payment of the temporary total disability compensation rate for the maximum weeks allowed for the amputated scheduled member. K.A.R. 51-7-8(b)(3) provides:

> If a scheduled member other than a part of a finger, thumb, or toe is amputated, compensation shall be computed by multiplying the number of weeks on the schedule by the worker's weekly temporary total compensation rate. The temporary total compensation previously paid shall be deducted from the total amount allowed for the member.

Accordingly, for the loss of a scheduled member by amputation, the cap in K.S.A. 44-510(a)(4) is not applicable because the compensation awarded for such loss is simply not based upon a functional impairment and is instead limited by the number of weeks on the schedule for the particular scheduled member.

The Kansas Supreme Court recently said:

> When a statute is plain and unambiguous, we must give effect to its express language, rather than determine what the law should or should not be. We will not speculate on legislative intent and will not read the statue to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction. *Steffes v. City of Lawrence*, 284 Kan. ___, Syl. 2, ___ P.3d ___(No. 96,838, filed June 22, 2007); *Perry v. Board of Franklin County Comm'rs*, 281 Kan. 801, 809, 132 P.3d 1279 (2006).[4]

These members believe the Supreme Court's recent pronouncement that a statute's plain and unambiguous language should be followed dictates a finding that claimant's recovery in this matter is not capped at $50,000.

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BOARD MEMBER

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BOARD MEMBER

c: Richard D. Loffswold, Jr., Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[4] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).